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May 7, 2018

**VIA ECF**

Chambers of the Hon. Judith C. McCarthy  
United States Magistrate Judge  
United States District Court, Southern District of New York  
The Hon. Charles L. Brieant Jr.  
Federal Building and United States Courthouse  
300 Quarropas St.  
White Plains, NY 10601-4150

Dear Magistrate Judge McCarthy:

Re: Claudia Barbini and Maryetta Henry v. First Niagara Bank, et al.  
Civil Action No: 16-CV-7887

I am submitting this letter on behalf of Defendants KeyBank National Association (incorrectly referenced as “Key Bank N.A.” in the caption), successor by merger to First Niagara Bank, N.A. (“First Niagara”), Irina Damyanidu, and Robert McMichael (collectively, the “Bank” for this letter). The Bank submits this letter and the attached Declaration of Lura Bechtel, attached as **Exhibit A**, in support of its motion for a protective over to preclude the plaintiffs from asking questions about legal advice that Ms. Bechtel provided as the Bank’s in-house legal counsel.

The attorney-client privilege issue at the crux of this motion first arose during the April 26, 2018 deposition of Defendant McMichael, a Human Resources Manager for the Bank. Relevant excerpts from the transcript of McMichael’s deposition are attached as **Exhibit B**. During his deposition, counsel for the parties contacted Your Honor via telephone concerning the applicability of the attorney-client privilege to Mr. McMichael and other Bank employees as it relates to this lawsuit. Your Honor asked that the Bank’s counsel brief the issue via letter motion. Below is a brief synopsis of this case and the communications at issue followed by the legal analysis supporting the Bank’s motion for a protective order.

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### **BACKGROUND**

This is an employment discrimination and retaliation suit brought by two former employees, Plaintiffs Claudia Barbini and Maryetta Henry, who were terminated from their employment at the Bank on or around September 9, 2015.

A number of employees at the Bank are notaries and are therefore required to follow the New York Notary Public License Law and the Bank's notary public policy. The Bank's policy states, in pertinent part: "The person requesting the notary service ***must be physically present in front of you*** and sign the document prior to applying the notary stamp to the document." (emphasis added).

In her position as Assistant Branch Manager, Plaintiff Claudia Barbini was also a licensed notary, and she notarized documents for customers and at the request of management at both branches. As a Senior Teller, Plaintiff Maryetta Henry was also a licensed notary. She notarized documents for customers and at the request of the management at the Vassar Branch.

In or around September 2015, Area Manager Irina Damyanidu discovered that notaries at Plaintiffs' branches may have been improperly notarizing documents in violation of Bank policy. An investigation revealed that Henry and Barbini had been notarizing documents without the customer being present. It was also determined that Defendant Hugh Lawless, former Branch Manager, knew about the practice and participated in obtaining customer signatures and presenting the document to a notary without the customer present.

The crux of this case is Plaintiffs' retaliation claim. Plaintiff Henry reported that on or about August 14, 2015, Lawless sent Henry and another employee, a text message with a link to an inappropriate website. The Bank immediately investigated the incident after Henry reported the matter. The Bank issued a final written warning to Defendant Lawless the following week.

#### **A. Privileged Communications Regarding the Investigation and Final Written Warning to Lawless**

Mr. McMichael was the HR representative assigned to investigate Plaintiff Henry's claim concerning the text message from Lawless. As the result of Mr. McMichael's investigation, the Bank placed Defendant Lawless on final written warning.

At deposition, Mr. Michael testified that he had communications with Lawless' Area Manager, Irina Damyanidu, and the Bank's in house legal counsel, Lura Bechtel, Esq, concerning the decision to place Lawless on a final written warning. Ex. B. Tr. 49-50. The Bank's counsel objected to the questions that sought to elicit testimony regarding McMichael's specific discussions with Bechtel. *See id.* Tr. 50, 109-118.

As explained in the accompany declaration of Lura Bechtel, she was employed as the Bank's in-house employment attorney and regularly provided legal advice on employment

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matters. Bechtel Decl., ¶¶ 4-6. Any communications that Attorney Bechtel had with Robert McMichael or others at the Bank regarding the Bank's decisions to issue a final written warning to Lawless were solely for the purpose of providing legal advice on behalf of the Bank. *Id.* at ¶ 9. This is not a situation where Attorney Bechtel was in a business role and merely happened to hold a law degree. She was the Bank's in-house employment attorney.

### **B. Privileged Communications Regarding the Termination of Lawless and Plaintiffs**

In his testimony, McMichael indicated Marlys Regina, also in the Bank's HR Department, "may" have sought Attorney Bechtel's advice regarding the Bank's decision on whether or not to terminate Lawless and Plaintiffs. Ex. B, Tr. 114-15. He did not have any communications with Attorney Bechtel regarding termination, and he had no direct knowledge of whether or not Ms. Regina had such communications with Attorney Bechtel or any other attorney regarding the bank notary policy. *Id.* at 115-117.

In or around September 2015, Attorney Bechtel "may have been asked by Marlys Regina (Kotyuk), Human Resources Manager, to provide legal advice regarding the termination of Lawless and Plaintiffs Maryetta Henry and Claudia Barbini." Bechtel Decl., ¶ 8.

Ms. Regina has not been deposed in this action, however, the parties have discussed the possibility of arranging for her video conference deposition in early June 2018 – prior to the cutoff for fact depositions.

### **ANALYSIS**

The decision in *Anderson v. E. CT Health Network, Inc.*, No. 3:12CV785 RNC, 2014 WL 109115 (D. Conn. Jan. 10, 2014) provides a good overview of the applicable Second Circuit law in this area:

[t]he attorney-client privilege protects confidential communications between client and counsel made for the purpose of obtaining or providing legal assistance.... [W]e construe the privilege narrowly because it renders relevant information undiscoverable; we apply it "only where necessary to achieve its purpose." The burden of establishing the applicability of the privilege rests with the party invoking it.

*In re County of Erie*, 473 F.3d 413, 418–19 (2d Cir.2007) (citations omitted). "A party invoking the attorney-client privilege must show (1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice." *Id.* at 419. The party invoking a privilege bears the burden of establishing all of the elements. *See United States v. Int'l Bhd. of*

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*Teamsters, Chauffeurs, Warehousemen and Helpers of Am., AFL–CIO*, 119 F.3d 210, 214 (2d Cir. 1997).

*Id.* at \*2.

Here, McMichael and Regina sought Attorney Bechtel’s **legal** advice on employment matters and all such communications were intended to be confidential. As noted by the court in *Anderson*, “[t]he issue of whether a confidential communication between client and counsel is generated for the purpose of obtaining or providing legal assistance often arises in the context of communications with corporate in-house lawyers who also serve as business executives.” *Id.* at 3. But this is not a case where the in-house attorney was also providing business advice. Attorney Bechtel was clearly an in-house employment attorney whose function was to provide legal advice to Human Resource managers. She was not wearing a “business hat” for the Bank. These facts demonstrate that the predominant feature of any communications with Attorney Bechtel was to provide and obtain legal advice. *See id.* (citing *Lolonga–Gedeon v. Child & Family Services*, No. 1:08CV300A(F), 2012 WL 1714914, at \*4 (W.D.N.Y. May 15, 2012) (attorney-client privilege protected pre-termination communications between executive and outside counsel regarding how to avoid being accused of employment discrimination in event defendant decided to terminate plaintiff’s employment); *Boudreau v. Gonzalez*, No. 3:04CV1471(PCD), 2006 WL 3462655, at \*4 (D.Conn. Nov. 29, 2006) (attorney-client privilege protected pre-termination communications between employer and outside counsel who was retained to provide legal advice to regarding employee’s accusation of harassment); *cf. Ashkinazi v. Sapir*, No. 1:02CV002(RCC)(MHD), 2003 WL 76986, at \*1 (S.D.N.Y. Jan. 09, 2003) (attorney-client privilege protected pre-termination communications between defendant and in-house counsel regarding legal implications of plaintiff’s accusations of misconduct and contract dispute but not counsel’s business assessment of plaintiff’s performance)).

Based on the foregoing, the Court should issue a protective order finding that any communications that Attorney Bechtel may have had with Marlys Regina, Robert McMichael, or others at the Bank regarding the Bank’s decisions to issue a final written warning to Lawless and the terminations of Lawless and Plaintiffs were solely for the purpose of providing legal advice on behalf of the Bank, and that Plaintiffs are therefore prohibited from asking about such communications during depositions.

Respectfully submitted,  
 s/Joseph S. Brown  
 Joseph S. Brown

cc: Brooke Dana Youngwirth, Esq.  
 Deidra Jenerva Brown, Esq.  
 Melissa Cohen, Esq.  
 (via ECF)

# Exhibit A

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
CLAUDIA BARBINI and MARYETTA HENRY,  
Plaintiffs,

v.

Civil No.: 16-CV-7887-NSR-JCM

FIRST NIAGARA BANK, N.A., KEY BANK N.A. as  
successor in interest to First Niagara Bank N.A., et al.,  
Defendants.

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**DECLARATION OF LURA H. BECHTEL**

**LURA H. BECHTEL**, under the penalties of perjury and pursuant to 28 U.S.C. § 1746, declares the following to be true and correct:

1. I was previously employed as an attorney by Defendant KeyBank National Association (incorrectly referenced as “Key Bank N.A.” in the caption) successor by merger to First Niagara Bank, N.A. (“First Niagara”) (collectively, the “Bank” for purposes of this motion). I submit this declaration in support of the Bank’s motion for a protective order.

2. I earned a B.S., Industrial and Labor Relations from Cornell University, and a J.D. from St. John’s University School of Law. I was admitted to the New York bar in 2004 and continue to be an attorney in good standing.

3. I joined Hodgson Russ in 2005 as an associate attorney in the Labor & Employment Group, where I advised employers on a broad range of labor and employment matters.

4. In May 2011, I joined First Niagara as First Vice President, Assistant General Counsel. My job duties included enterprise-wide management of lawsuits and investigations, including discovery and eDiscovery; providing employment law expertise,

counseling, and compliance support on enterprise-wide basis including compensation (executive and broad-based), employee benefits design & administration, and payroll.

5. After First Niagara's merger with KeyBank, I continued to perform the same functions listed above as Senior Vice President, Senior Counsel for KeyBank. I returned to Hodgson Russ in May 2017 as a partner in the Labor & Employment Group.

6. In the course of my in-house employment attorney duties at the Bank, I regularly provided legal advice to Human Resource managers on various personnel decisions.

7. In or around August 2015, I was asked by the Bank's Human Resources Manager, Robert McMichael, for legal advice about the Bank's decision to issue a final written warning to former Branch Manager, Hugh Lawless.

8. In or around September 2015, I may have been asked by Marlys Regina (Kotyuk), Human Resources Manager, to provide legal advice regarding the termination of Lawless and Plaintiffs Maryetta Henry and Claudia Barbini.

9. Any communications that I had with Regina, McMichael, or others at the Bank regarding the Bank's decisions to issue a final written warning to Lawless and the terminations of Lawless and Plaintiffs were solely for the purpose of providing legal advice on behalf of the Bank. Any such communications were intended to be confidential.

Dated: May 7, 2018

s/Lura H. Bechtel  
Lura H. Bechtel

# Exhibit B



COPY

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

CLAUDIA BARBINI and MARYETTA HENRY,

Plaintiffs,

- against -

KEY BANK, N.A., as successor in interest to  
FIRST NIAGARA BANK, N.A., FIRST NIAGARA BANK,  
N.A., IRINA DAMYANIDU, in her official and  
individual capacities, ROBERT McMICHAEL, in  
his official and individual capacities and  
HUGH LAWLESS in his official and individual  
capacities,

Defendants.

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April 26, 2018  
10:00 a.m. - 1:40 p.m.  
Poughkeepsie, New York

Marianne Glum, Reporter

DEPOSITION

OF

ROBERT McMICHAEL

McMICHAEL

1  
2 A. She was uncomfortable with  
3 Mr. Lawless and him remaining the branch  
4 manager. She was just uncomfortable.

5 Q. What was the nature of her  
6 discomfort?

7 A. That she was aware now that he  
8 accessed those websites.

9 Q. Did she say anything else?

10 A. I'm thinking of our  
11 conversation. You know, I asked her to  
12 provide some more details around comfort.  
13 And she had said she just wasn't sure how  
14 he would be looking at her now knowing that  
15 he accessed those type of sites.

16 Q. Going back briefly to your  
17 decision to issue a final warning, you  
18 mentioned that you discussed it internally  
19 with your team and you indicated that  
20 in-house counsel was one of the team  
21 members you spoke with.

22 A. Yes.

23 Q. Who did you speak with in the  
24 in-house counsel office?

25 A. Lura Bechtel.

1 McMICHAEL

2 Q. Who else was on the team?

3 A. Irina.

4 Q. Anyone else?

5 A. No, no one else.

6 Q. Between the three of you, you  
7 discussed it in-house and came to the  
8 conclusion that you should issue a final  
9 warning?

10 A. Yes.

11 Q. Was that Ms. Bechtel's  
12 perspective on it based on your discussions  
13 with her?

14 BY MR. BROWN: Objection on the  
15 basis of attorney-client privilege.  
16 You don't have to answer that.

17 BY MS. BROWN: I'm sorry,  
18 Ms. Bechtel was in-house counsel.

19 BY MR. BROWN: Yes.

20 BY MS. BROWN: I'm not sure  
21 that the privilege attaches in these  
22 proceedings. She's not representing  
23 him in these proceedings. I'll leave  
24 it alone.

25 Q. After your conversation with

1                                   McMICHAEL

2           your team, there was a decision to issue a  
3           final warning. Was everyone on your team  
4           in agreement with that?

5                   A.       Yes, after the conversation.

6                   Q.       And the reason that everybody  
7           was in agreement was because you talked  
8           about Hugh Lawless being a new branch  
9           manager; was that one of the reasons, in  
10          part?

11                           BY MR. BROWN: Objection. You  
12                   can answer.

13           BY THE WITNESS:

14                   A.       In part. That was part of the  
15           conversation, yes.

16           BY MS. BROWN:

17                   Q.       What were some of the other  
18           reasons given for issuing a final warning  
19           in lieu of termination?

20                   A.       Again, related to the concerns  
21           that we had with him as being a manager,  
22           that was him being new, just him being new  
23           to First Niagara. In relation to the text  
24           message, it was, you know, you asked other  
25           factors, intent. It was noted several

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McMICHAEL

wanted to terminate Mr. Lawless?

A. Yes.

Q. And you were aware of that at the time you consulted with your team?

A. Yes.

Q. What did Ms. Bechtel tell you with regard to the sexual harassment allegations against Mr. Lawless?

BY MR. BROWN: And at that point I am objecting on the basis of attorney-client privilege and instructing Mr. McMichael not to answer that question.

BY MS. BROWN: Off the record for just a moment.

(OFF THE RECORD DISCUSSION)

BY MS. BROWN: Counsel has just had a discussion off the record with regard to Judge McCarthy's instructions. It is Mr. Brown's understanding that Mr. McMichael is not to answer the questions but that

1                                   McMICHAEL

2                   I am simply to pose the questions.

3                   We will abide by that understanding.

4                   Q.       On approximately how many  
5 occasions did you meet with Lura Bechtel or  
6 discuss the sexual harassment investigation  
7 with her?

8                   BY MS. BROWN:   You can answer  
9 that. The fact that you met with  
10 her, that in and of itself is not  
11 privileged. The substance of what  
12 you talked is what I am objecting to.  
13 So don't put that out there.

14 BY THE WITNESS:

15                  A.       At least once, maybe twice.

16 BY MS. BROWN:

17                  Q.       Did you meet with her in  
18 person?

19                  A.       By phone.

20                  Q.       Were there any emails exchanged  
21 between you and Ms. Bechtel?

22                  A.       I do not believe so.

23                  Q.       I am talking now with regard to  
24 emails about the sexual harassment  
25 investigation.

1 McMICHAEL

2 A. Yes.

3 Q. Did you provide Ms. Bechtel  
4 with a copy of the report or the case  
5 details in connection with the sexual  
6 harassment investigation?

7 A. I don't recall if I had  
8 provided her report. There is a way to add  
9 her to the system, but I'm not sure if she  
10 was added to the system or not.

11 Q. I'm asking now, before you made  
12 the decision to issue the final warning to  
13 Mr. Lawless, which would have been in or  
14 about August 17th, 18th of 2015, at that  
15 time when you spoke to Ms. Bechtel, had she  
16 read the case details which are marked as  
17 Plaintiff Henry Exhibit 4 for  
18 identification?

19 A. I'm not sure.

20 BY MR. BROWN: Objection to the  
21 form.

22 BY THE WITNESS:

23 A. I'm not sure.

24 BY MS. BROWN:

25 Q. Had you provided her with a

1 McMICHAEL

2 copy of those details by that time?

3 A. I'm not sure.

4 Q. What information did you tell  
5 Ms. Bechtel about the ongoing sexual  
6 harassment investigation?

7 BY MR. BROWN: Objection on  
8 attorney-client privilege.

9 BY MS. BROWN:

10 Q. Were you present when  
11 Ms. Damyanidu spoke with Ms. Bechtel about  
12 the sexual harassment investigation?

13 A. Yes.

14 Q. What information did  
15 Ms. Damyanidu tell Ms. Bechtel about the  
16 sexual harassment investigation?

17 BY MR. BROWN: Objection on the  
18 basis of attorney-client privilege.

19 BY MS. BROWN:

20 Q. With regard to the choice  
21 between issuing a final warning and  
22 terminating Mr. Lawless, what did  
23 Ms. Bechtel tell you about those two  
24 choices?

25 BY MR. BROWN: Objection on the



1 McMICHAEL

2 basis of attorney-client privilege.

3 BY MS. BROWN:

4 Q. Did she advise you as to  
5 whether one option was better than the  
6 other?

7 BY MR. BROWN: Objection on the  
8 basis of attorney-client privilege.

9 BY MS. BROWN:

10 Q. Did she give you any advice  
11 with regard to whether terminating  
12 Mr. Lawless would or would not comply with  
13 employment law?

14 BY MR. BROWN: Objection.  
15 Attorney-client privilege.

16 BY MS. BROWN:

17 Q. When you spoke with  
18 Ms. Bechtel, did she give you advice with  
19 regard to whether Mr. Lawless's activity  
20 constituted a violation of First Niagara's  
21 sexual harassment policy?

22 BY MR. BROWN: Objection.  
23 Attorney-client privilege.

24 BY MS. BROWN:

25 Q. You testified earlier that it

1 McMICHAEL

2 was your practice to consult with  
3 Ms. Bechtel on matters of employee  
4 misconduct; is that a fair statement?

5 A. At times, yes, I would consult  
6 with her, yes.

7 Q. You consulted with her in  
8 connection with the sexual harassment  
9 investigation against Mr. Lawless, you've  
10 already testified to that, so that's  
11 accurate, correct?

12 A. Yes.

13 Q. You also mentioned that Marlys  
14 Kotyuk Regina, who is a member of your  
15 team, also consults regularly with  
16 Ms. Bechtel?

17 A. Yes.

18 Q. And it's fair to say that  
19 Ms. Kotyuk Regina is the human resources  
20 manager who investigated the notary issue?

21 A. Yes. Who participated in the  
22 investigation, yes.

23 Q. She works for you?

24 A. She does.

25 Q. You testified that she had a

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McMICHAEL

team that she consulted with regard to  
Ms. Henry and Ms. Barbini and Mr. Lawless  
should be terminated in the wake of the  
notary investigation, correct?

A. Correct.

Q. You testified that Ms. Bechtel  
was part of her team as well?

A. I testified she may have been  
part of their team.

Q. Do you have any independent  
knowledge of what Ms. Bechtel may or may  
not have advised Ms. Kotyuk Regina with  
regard to the notary policy?

BY MR. BROWN: Objection on the  
grounds of attorney-client privilege.

BY MS. BROWN:

Q. Have you ever spoken with  
Ms. Bechtel about the notary laws in the  
State of New York?

BY MR. BROWN: Objection.  
Attorney-client privilege. Actually,  
you know what, I am going to withdraw  
that objection.

BY MS. BROWN: I don't think

1                               McMICHAEL

2                               that's attorney-client privilege.

3                               BY MR. BROWN: I am going to  
4                               withdraw that objection. You can  
5                               answer that question.

6 BY MS. BROWN:

7                               Q.       Have you spoken with  
8                               Ms. Bechtel about New York State notary  
9                               law?

10                              A.       I have not.

11                             Q.       Have you sought her advice with  
12                             regard to whether or not New York State  
13                             requires the notary to have the signatory  
14                             in front of them when they affix their  
15                             notary stamp to official documents?

16                             A.       I have not.

17                             Q.       Have you discussed with  
18                             Ms. Bechtel the bank's zero tolerance  
19                             policy with regard to notarial misconduct?

20                             A.       I have not.

21                             BY MS. BROWN: Thank you.

22 EXAMINATION BY

23 MS. YOUNGWIRTH:

24                             Q.       Do you know whether anyone at  
25                             First Niagara spoke with Ms. Bechtel or any

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McMICHAEL

other attorney regarding the interpretation  
of First Niagara's notary policy?

A. I am not aware.

Q. Is that that you don't know or  
you are not aware?

A. I am not aware.

Q. Do you know whether or not  
anyone at First Niagara consulted with  
either Ms. Bechtel or another attorney  
prior to terminating Ms. Henry and  
Ms. Barbini?

A. I'm not aware.

Q. Do you know who would know  
that?

A. Marlys Regina would know.

Q. Do you know whether anyone ever  
gave Ms. Bechtel a copy of the text message  
that Hugh sent to Maryetta Henry?

A. I don't recall if she was  
provided a copy.

Q. Is there anything that would  
refresh your recollection as to whether or  
not she was?

A. If there is an email exchange

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McMICHAEL

or an email forwarded to Ms. Bechtel it  
would.

BY MS. BROWN: I have a  
question.

EXAMINATION BY

MS. BROWN:

Q. When you spoke with Ms. Bechtel  
about the issue of issuing a final warning  
versus termination, did Ms. Bechtel tell  
you that it would be preferable for you to  
issue a final warning?

BY MR. BROWN: Objection on the  
basis of attorney-client privilege.

BY MS. YOUNGWIRTH: I guess we  
will switch now back over to regular  
questions.

EXAMINATION BY

MS. YOUNGWIRTH:

Q. Since Barbini's and Ms. Henry's  
terminations, have you been involved in any  
investigations with regard to other  
employees that have allegedly violated the  
notary policy?

A. No.